Supreme Court, U.S.
FILED
MAR 9, 1988

No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON,
EDWARD C. SCHMULTS, and
CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL LAW

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL LAW

INTEREST OF COMMON CAUSE

Common Cause, a citizens' organization of 290,000 members dedicated to integrity, openness, and accountability in government, has been an active advocate of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591 *et seq.*, Pub. L. No. 95-521, 92 Stat. 1824, since the original bill was introduced.[1] Common Cause has filed briefs *amicus curiae* in support of the Independent Counsel provisions of the Act not only in the lower court in this case,[2]

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[1] The law has been twice amended and reenacted. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039; Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-181, 101 Stat. 1293.

[2] *In re Sealed Case*, No. 87-5261 (D.C. Cir. Jan. 22, 1988) (slip op.).

but in other cases involving the constitutionality of the Act.

Common Cause submits this brief in support of Appellant and the constitutionality of the Independent Counsel provisions of the Ethics Act. The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

I. Article II

Four propositions demonstrate that the Ethics in Government Act of 1978 does not unconstitutionally attempt to vest in the Independent Counsel functions that must remain under Presidential control by virtue of Article II.

First, the Ethics Act confers upon the Independent Counsel only that degree of independence in the conduct of specific criminal investigations and prosecutions necessary to preserve public confidence in the integrity and impartiality with which the rule of law is applied to certain high government officials in whom the President or Attorney General have personal or partisan political interests which are likely to conflict with the even-handed administration of justice. An Independent Counsel is an officer whose role is limited to sharply defined bounds set by others, whose term is temporary, who is subject to the web of restraints imposed on all prosecutors by both the Justice Department and the courts, and who may be removed from office for avoidable violation of the Department's policies or other malfeasance or misconduct.

Second, even assuming that some executive functions are exclusively Presidential, the limited functions of the Independent Counsel are not so essentially Presidential as to fall in that category. A wealth of legal and constitutional history combine with contemporary practice to show that, although the federal practice has usually been to reserve ultimate control of prosecutions to the President and Attorney General, that control has never been regarded as a constitutionally exclusive prerogative of the

Chief Executive. Indeed, despite the federal practice, structural *separation* of prosecutorial functions from the Chief Executive has always been far more common than consolidation, in both Britain and the United States.

Third, neither the vesting of "executive power" in a President, U.S. Const. Art. II, § 1, cl. 1, nor the charge that the President "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, requires that the President control every function that might be described as executive. The Court has often sustained the constitutionality of laws giving another officer or agency the final responsibility for performing a discretionary function that might otherwise be performed by the President. This long-established principle carries the greatest force where, as here, the purpose of creating an independent office is to eliminate the risk of personal or political interference with impartial enforcement of the rule of law against high officials.

Fourth, where Congress and the President have power by law to create an office independent of Presidential control in order to ensure entire impartiality, they also have power by law to forbid the President from removing the officers without good cause.

II. Separation of Powers

The Ethics Act does not violate the separation of powers. The Act does not give Congress a role in the selection of the Independent Counsel or in the Counsel's conduct of an investigation or prosecution. The power given to the courts does not enlarge the constitutional functions of the courts. The power to appoint counsel and define his jurisdiction is granted by the express words of Article II, Section 2. *Ex Parte Siebold*, 100 U.S. 371 (1879). The judicial function under Article III has long embraced such powers over the conduct of prosecutors, and of judicial review of dismissals for just cause, as are authorized by the Ethics Act.

III. Appointments Clause

The limited nature of the Independent Counsel's responsibilities, as well as history and contemporary practice, combine to demonstrate that the Independent Counsel are "inferior officers" whose appointment Article II, § 2, cl. 2, expressly authorizes Congress "by law" to vest in the courts of law. Nothing in the text, history, context or policy of the Constitution supports the court of appeals' conclusion that "inferior" must carry the meaning "subordinate to a principal officer." *In re Sealed Case*, slip op. at 17. *Ex Parte Siebold* makes plain that the courts may be vested with power to appoint non-judicial officers when congruent with their duties under Article III. No incongruity is involved in the court appointment of a prosecutorial official.

ARGUMENT

I. THE ETHICS ACT DOES NOT UNCONSTITUTIONALLY ASSIGN TO INDEPENDENT COUNSEL FUNCTIONS WHICH ARE THE EXCLUSIVE RESPONSIBILITY OF THE PRESIDENT UNDER ARTICLE II.

A. The Functions Assigned to Independent Counsel Are Limited to The Conduct of A Specific Class of Cases in Which The President Is Likely to Have A Disqualifying Personal or Political Interest.

The Independent Counsel provisions of the Ethics Act are designed to implement two ideals fundamental to our constitutional system. One is the rule of law, which binds even the President and denies the President the power to set the law aside or to exempt any official from the usual, impartial steps in the administration of criminal justice. The second is the principle of equal justice under law, which precludes any official with a personal or partisan interest in the outcome from participating in the administration of criminal justice in a particular case. Observance of both these principles is essential to the preservation of that public trust in government without which a free society cannot survive.

Watergate demonstrated that disregard of these principles, particularly by self-interested Presidential intervention in a criminal investigation, precipitates a major crisis in the public's trust in government. Prior to the appointment of a Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice had served as a "conduit for a constant flow of information from the grand jury and the prosecutors" to both President Nixon and his counsel. S. Rep. No. 981, 93rd Cong., 2d Sess. 80 (1974). White House counsel was told the identity of witnesses who would be called before the grand jury and what questions they would be asked. *Id.* The Department of Justice made sure that the investigation was narrowed down. *Id.* Later, after extensive hearings, the House Judiciary Committee that reported the Ethics Act concluded:

> The Attorney General is at the same time the chief Federal law enforcement official and a Presidential appointment who is a key member of the President's cabinet. Cases involving possible wrongdoing by high-level executive branch officials, therefore, present a fundamental conflict of interest.
>
> H.R. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978).

In 1982 and again in 1987, after nine years' experience during which time there was need to appoint Independent Counsel on ten occasions, Congress—both times with the concurrence of President Reagan—again reached the conclusion that legislation was needed to meet the grave danger of improper Executive interference with criminal investigations of high-ranking Executive officials. Not only actual conflict, but the appearance of conflict was deemed by Congress to be a compelling justification for the law.[3]

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[3] As phrased by the Senate Judiciary Committee:

> The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Having men of integrity operate in the face of a conflict is an insufficient protection for a system of justice.
>
> S. Rep. 170, 95th Cong., 1st Sess. 6 (1977).

The independence of the investigation into charges of wrongdoing by a high executive official is also the best protection against unjust injury to the innocent. A prosecutor with personal or political ties to the individual charged may intentionally or unintentionally be unfairly aggressive because of awareness that he may be suspected of favoritism. His decision not to prosecute will do little to restore the official's reputation if the public has reason to suspect that the decision was influenced by personal favoritism. The present Attorney General has testified that the appointment of an Independent Counsel "was the only effective and fair way to determine the merits" of charges of wrongdoing against him while he was Counsellor to the President. *The Confirmation of Edwin Meese III to be Attorney General of the United States: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 96 (1985).[4]

The provisions of the Act are carefully tailored to secure these goals. They apply only to criminal investigations against a very limited number of high officials, in the outcome of which the President or Attorney General will often have a disqualifying personal interest because of either close association or the probable effect of the disposition of the charges upon their own political fortunes.[5] Independent Counsel are to be appointed only if,

[4] Experience disproves the court of appeals' suggestion that the statutory freedom of Independent Counsel from Presidential oversight subjects high officials to risk of serious unfairness because an Independent Counsel will feel excessive pressure to produce indictments and convictions. *In re Sealed Case*, slip op. at 65-70. Six of the ten Independent Counsel have closed their investigations without an indictment. Three investigations are still pending. Only two indictments have been returned, one in a pending investigation. *New York Times*, January 23, 1988 at 8, col. 2.

[5] 28 U.S.C. § 591(b) limits coverage to charges of wrongdoing by the President, Vice President, high officials in the White House, Justice Department and CIA, and ranking officers of the President's national campaign committee. Additionally, under Section 591(c), the Attorney General may request an independent counsel if he

after a "preliminary investigation" by the Department of Justice, the Attorney General finds "reasonable ground to believe that further investigation or prosecution is warranted." 28 U.S.C. § 592.

In requiring the Attorney General to apply for the judicial appointment of an Independent Counsel in this narrow class of cases, Congress did no more than to invoke the ancient legal and equitable principle that a fiduciary should stand aside from any transaction in which he has personal or pecuniary interests, even though he sincerely believes that he can—and conceivably can—weigh the beneficiaries' interests without regard to his own. The Attorney General is a fiduciary charged with securing for the benefit of the public the disinterested investigation and prosecution of federal crimes. Personal and partisan interest in the outcome of a criminal investigation is no less disqualifying than a financial interest. Close official and political association is scarcely less disqualifying than the ties of family and friendship. Many honorable Attorneys General would recuse themselves from personal participation in a sizeable proportion of the cases covered by the Ethics Act. So would a President. The Act does little more than make this precept law for the special category of cases in which the disqualifying conflict is most likely to arise.

The powers of any Independent Counsel are confined within a carefully circumscribed area. Section 592(d)(1) requires the Attorney General to furnish the court sufficient information to define the "prosecutorial jurisdiction" of an Independent Counsel. Section 593(b) directs the court to define that jurisdiction. It is implicit that the jurisdiction of an Independent Counsel will be confined to investigating activities substantially related to the conduct constituting the violation or violations of

determines that an investigation by the Justice Department "may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c).

law suggested in the information submitted by the Attorney General to the court.

The Act gives an Independent Counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers" with respect to the specific matters confined to him. 28 U.S.C. § 594(a). The Justice Department is forbidden to interfere within that jurisdiction. 28 U.S.C. § 597. This degree of independence is secured by a prohibition against removal without good cause. 28 U.S.C. § 596(a). Without these safeguards there could be no assurance that in a case involving one or more officials high in the Administration the conflicting personal or political interests of the President or Attorney General would not defeat or distort the cause of justice.

This danger has both obvious and subtle forms. Congress was well aware of the best illustration of the obvious form—the first Watergate Special Prosecutor was dismissed contrary to assurances of total independence and of security against his removal for anything other than "extraordinary improprieties." 28 C.F.R. § 0.37 (1973).

The need for safeguards against subtler, less dramatic interference is even greater. The attorney in charge of a case against a high executive official will often be required to decide such questions as whether to pursue or drop a particular line of investigation, whether to summon a particular witness before the Grand Jury, whether to subpoena certain documents or to respect claims of privilege, whether to grant immunity to a witness, or whether and when to seek and release an indictment against one of the possible defendants. Under many circumstances the decision of such a question may carry, or seem likely to carry, serious political or personal implications for the President or Attorney General. Direct and indirect pressure may be put upon the prosecutor. The closer the question, the greater the need for independence. The attorney in charge of the investigation

will find himself in a quandary if the President or Attorney General retains power to remove him and terminate his investigation. Is the particular witness, piece of evidence or line of investigation so important to the discharge of his responsibility as to justify risk of dismissal and termination of independent investigation? Or would the ultimate goal best be pursued by yielding in the particular instance?

Although he is guaranteed a measure of independence, an Independent Counsel has no power to make policy. He is bound by the policies established for the Department of Justice unless inconsistent with his statutory duty. 28 U.S.C. § 594(f). Any significant violation of an established departmental policy might well give "good cause" for the Attorney General to remove an Independent Counsel, as authorized by Section 596(a)(1).

The restraints imposed by the established policies of the Department of Justice are very real. The Department has promulgated extensive guidance in Title 28, Part 45 of the Code of Federal Regulations, and in the three massive volumes on criminal proceedings from the U.S. Attorneys Manual.[6]

In deciding whether to begin or to decline prosecution, the federal prosecutor is bound by the principles of federal prosecution, U.S.A.M. 9-27 (1984), which state in some detail the situations in which it is or is not proper to exercise the prosecutor's discretion in favor of prose-

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[6] Departmental regulations require an attorney to disqualify himself for any personal or political relationship that might undermine impartiality. 28 C.F.R. 45.735-4 (1987). Proceedings in the grand jury are the subject of very extensive policy recommendations dealing with everything from what advice must be given to recipients of subpoenas, to the disclosure of exculpatory evidence and the proper use of contempt. *E.g.*, U.S.A.M. 9-11.260, 9-11.334, 9-39.000 (1984). The U.S. Attorneys Manual provides direction and guidance in many cases as to when it is appropriate or inappropriate to use a particular statute. *E.g.*, U.S.A.M. 9-27.210-27.260 (1984); *see also* 28 C.F.R. 59.1(b) (1987), 28 C.F.R. 50.10 (1987), U.S.A.M. 9-11.270 (1984).

cution. As members of the bar, federal prosecutors are also required to conform to the professional canons and rules of the courts.[7] The prosecutor's conduct at trial is no less bound by court rules, department standards, and professional canons of behavior.

In sum, although an Independent Counsel is charged with the ultimate responsibility for decisions concerning a particular investigation and any resulting prosecutions, his decisions are made within an extensive framework of professional obligations and traditions, judicial oversight, and Department of Justice policies and rules. In his handling of cases, the prosecutor has duties to the law, to his profession, and to the courts.

B. Article II Does Not Bar Assigning To An Independent Counsel The Conduct of Particular Investigations And Prosecutions In A Limited Category of Cases In Which The President Is Likely To Have A Disqualifying Personal Or Political Interest.

The majority opinion below advances two overlapping reasons for rejecting the proposition stated above: first, the broad proposition that Article II incorporates the concept of a unitary executive under the President and therefore bars any law vesting any independent responsibility for any "executive" function in any other official, slip op. at 42; second, the narrower proposition that, in any event, control over all criminal investigations and prosecutions is a quintessential Presidential responsibility which may not be limited or denied in any part, even by a law enacted by Congress and signed by the President. *Id.* at 26, 51.

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[7] The ABA Model Code of Professional Responsibility stresses the prosecutor's responsibility to "seek justice, not merely to convict." Model Code of Professional Responsibility, E.C. 7-13 (1981). Disciplinary Rule 7-103 circumscribes the prosecutor's conduct by stipulating that a prosecutor may not initiate criminal charges when he knows the charges are not supported by probable cause, and by requiring a prosecutor to make timely disclosure to the defense of any evidence negating guilt or punishment. *Id.* at D.R. 7-103.

We deal with the narrower contention first. We also assume that, under Article II, there are some Presidential prerogatives of which he may not be deprived by legislation. Nevertheless, both history and precedent demonstrate that the conduct of particular criminal investigations and prosecutions is not an essential Presidential function. We then show that the sweeping concept of a unitary executive advanced by the court below is contrary to well-established practice and the decisions of this Court.

1. *History and Precedent Both Demonstrate That The Investigation and Prosecution of Such Cases Is Not An Essential Presidential Function.*

To prevail in this case the Independent Counsel need not show that no criminal investigations or prosecutions are the exclusive prerogative of the President. The Act applies, as we have shown, only in those situations in which the danger of conflict is the greatest. In truth, the partial structural separation created by the Ethics Act is far less than our legal and constitutional history and contemporary practice will support.

In describing a prosecutor as quintessentially an arm of the President, the majority below presented a view that contrasts strangely with legal history, American practice, and contemporary views of a prosecutor's duties. Moreover, although federal laws have usually vested a degree of control in the Executive Branch as a matter of practice, not of constitutional necessity, control over the conduct of specific cases has never been regarded as quintessentially executive and responsive to the head of state.

In early English history, prosecutions were not initiated by the Crown. Virtually all prosecutions were private, initiated by the victim of the crime.[8] A justice of

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[8] J. Baker, "Criminal Courts and Procedure at Common Law," in *Crime in England 1550-1800* 15-17 (J.S. Cockburn, ed. 1977); J.J. Tobias, *Crime and Police in England 1700-1900* 117-19 (1979);

the peace would then investigate the complaint, and if there was a *prima facie* case, he would issue a bill of indictment. If a grand jury then deemed the indictment a "true bill," the case went to trial. At trial, the victim generally acted as the "prosecutor," sometimes represented by counsel.[9]

In the century before the ratification of the Constitution, the English system of prosecution was still dominantly one carried on by private individuals. Indeed, concerned by the large number of crimes that went unprosecuted, Parliament enacted a series of measures to encourage private prosecutions.[10] By the late seventeenth century, private prosecuting societies developed to promote the "enforcement" of the laws."[11] Plainly these prosecutions were not subject to the King or the King's officers.[12] Neither the inquiries into possibly criminal activity nor the grand jury's indictments nor the conduct of the prosecution were subject to executive control.

Kurland, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 Duke C.J. 493, 494-7.

[9] *See generally*, Baker, *supra* at 15-20; Tobias, *supra* at 128-31.

[10] *E.g.*, "An Act for Encouraging the Apprehension of Highwaymen," 4 W & M ch. 8 (1692); "An Act for Indemnifying Persons Who Have Been Guilty of Offenses Against the Laws Made for Securing the Revenues of Customs and Excise," 9 Geo. 2, ch. 35 (1736); "An Act for the Better Preventing Theft and Highway Robberies," 25 Geo. 2, ch. 36 (1752); *see generally* 2 Radzinowicz, *History of the English Criminal Law and Its Administration from 1750* 57-63, 68-72, 74-82 (1956).

[11] Tobias, *supra* at 126-28; Radzinowicz, *supra* at 2-5, 122-3. These societies, composed of private individuals, raised money to hire agents to police certain districts, detect offenders, gather evidence and sponsor prosecutions. Similarly, local self-protection associations were formed to fulfill many of the roles later played by public police forces. Tobias, *supra* at 126-8, Radzinowicz, *supra* at 202-9.

[12] Not until the creation of a public police force in the mid-nineteenth century did a public body become responsible for prosecutions. A Director of Public Prosecutions was created in 1879, but even so, this office fulfilled a largely advisory role, giving assistance to the still-prevalent private prosecutors. Tobias, *supra* at 125.

The separation of criminal investigations and prosecutions from the executive functions of the Governor was also familiar in the American colonies, soon-to-become states. In the colonial era most prosecutions were initiated by the aggrieved citizen.[13] Justices of the peace were also quasi-prosecutors. In the period immediately after the adoption of the Constitution, the grand jury itself conducted much of a criminal investigation, in conjunction with the summons power of the magistrate, independent of the behest or supervision of a public prosecutor.[14] Where there were public prosecutors, their appointment was not the preserve of the chief executive. Connecticut's courts, for example, began appointing the state's district attorneys in 1704 and continued to do so until 1984.[15]

Today, in at least forty-four states where, as under the U.S. Constitution, government is based on the separation of powers, prosecutors are not subject to the Chief Executive. In forty-two states, the attorney general is elected. In Maine, the attorney general is appointed by the state legislature, and in Tennessee by the state su-

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[13] J. Smith, *Colonial Justice in Western Massachusetts* 129-30 (1961); J. Goebel and T. Naughton, *Law Enforcement in Colonial New York* 339-48, 370 (1970); Spindel, *The Administration of Criminal Justice in North Carolina, 1720-1740*, 25 Am.J. Legal Hist. 141, 146 (1981); Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," 42 N.Y.U.L. Rev. 450, 467-68 (1967); E. Page, *Judicial Beginnings in New Hampshire, 1640-1700* 107 (1959).

[14] M. Tachau, *Federal Courts in the Early Republic* 96 (1978). J. Goebel and T. Naughton, *supra* at 337, 350-51, 355-59; S. Walker, *Popular Justice* 111-12 (1980); Edwards, The Grand Jury, 21 Col.L.Rev. 376-78 (1921); 2 Z. Swift, *Digest of the Laws of the State of Connecticut*, 369 (1823 ed.).

[15] 4 Conn. Col. Rec. 468 (C. Hoadley, ed. 1868); Conn. Stat. 1808, p. 67 § 6; Conn. Stat. 1821, p. 141, § 22; Conn. Gen. Stat. § 51-278 (1983); Swift, *supra* at 369.

preme court.[16] The practice of electing local prosecutors is widespread.[17] Court appointment of special prosecutors is a common practice in the states.[18]

Given this background, it would be surprising to find that the Framers of the Constitution regarded control over all criminal prosecutions as an exclusive and indispensable function of the President. And indeed, the evidence of their views points the other way. Section 32 of the first Senate draft for the Judiciary Act of 1789 provided that each *district court* should appoint "a meet person learned in the law, to act as Attorney of the United States in such district," and that the Supreme Court should appoint "a meet person learned in the law to act as Attorney General for the United States . . . ." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 108-09 (1923). Five of the ten draftsmen of that provision, including Oliver Ellsworth, had attended the Philadelphia Convention.

Although the bill was revised to provide for Presidential appointment with the advice and consent of the

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[16] *See* National Association of Attorneys General: Committee on the Office of Attorney General, *Powers, Duties and Operations of State Attorneys General* 77-78 (1977).

[17] *See* Cal. [Gov't.] Code § 24009 (West 1968); Mo. Rev. Stat. § 56.010 (1986); Nev. Rev. Stat. Ann. § 252.020 (Michie 1986); N.C. Gen. Stat. § 7A-60 (1986); Okla. Stat. Ann. tit. 19, § 215.20 (West 1962 & Supp. 1988). The Colorado constitution provides for the election of local prosecutors. *See* Colo. Const. Art. VI, § 13.

[18] *See* Ala. Code § 12-17-185 (1975); Fla. Stat. Ann. § 27.16 (West 1974); Ga. Code Ann. § 15-18-5 (1985); Ill. Ann. Stat. ch. 14, para. 6 (Smith-Hurd 1987 Supp.); Nev. Rev. Stat. Ann. § 252.100 (Michie 1986). *See also Weems v. Anderson*, 516 S.W.2d 895 (Ark. 1974); *In re Shelley*, 2 A.2d 809 (Pa. 1938); *State v. Hayes*, 18 A.2d 895 (Conn. 1941); *Taylor v. State*, 38 So. 380 (Fla. 1905); *Territory v. Harding*, 12 P. 750 (Mont. 1887); *People ex rel. Lindsley v. District Court*, 66 P. 896 (Colo. 1901); *State v. Ganthier*, 231 P. 141 (Ore. 1924).

Senate,[19] the 19th century history of the Department of Justice argues against, rather than for, the proposition that control of criminal prosecutions was perceived to be an exclusively Presidential function. The early U.S. Attorneys were private lawyers who worked on the basis of fees for services rendered.[20] Their tie to the judiciary is reflected in the appropriation bills linking the fees and costs of the U.S. Attorneys, not with the executive, but with the courts.[21] U.S. judges filled vacancies in the office without requiring statutory authority. *See* 6 Op. Att'y Gen. 80 (1853). Indeed, Congress continued until the early 19th century the British practice of relying upon private informers to bring law violations to the attention of the courts.[22]

In 1870, U.S. Attorneys were brought under the Attorney General and Department of Justice.[23] The general conduct of law enforcement came under increasing executive control on behalf of the President. But these developments have never operated to make prosecution an absolute or unchangeable prerogative of the President and Department of Justice. A federal court may designate an attorney to prosecute a criminal contempt. *Young v. United States ex rel. Vuitton et Fils*, 107 S.Ct. 2124 (1987). In 1924 Congress did not hesitate to give the special counsel appointed to investigate the Teapot

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[19] There is no hint in the records, letters and diaries of the time to suggest that this revision was made for constitutional rather than policy reasons.

[20] White, *The Federalists: A Study in Administrative History* 406-08 (1948). *American State Papers*, Miscellaneous, I. 303 (1802).

[21] *See* "An Act to Establish the Judiciary Courts of the United States" *reprinted in* 5 C. Bickford & H. Vert. *Documentary History of the First Federal Congress: Legislative Histories* 1150, 1165 (1986).

[22] 1 Stat. 29, Sec. 29 (1789); 1 Stat. 65, Sec. 8 (1789); 1 Stat. 101, Sec. 3 (1790); 1 Stat. 452, Sec. 3 (1796); *see generally* L. White, *supra* at 415-17.

[23] *See* Seymour, *United States Attorneys* 22 (1975).

Dome scandal "charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding." Act of February 8, 1924, 43 Stat. 5 (1924). Criminal prosecutions were specifically included.

The argument of the court below for exclusive Presidential control of prosecutors draws scant support from the citation of hypothetical instances in which a prosecutor's pursuit of particular evidence or lines of inquiry might, if pressed too far, run counter to the views of the public interest held by other conscientious officials. *In re Sealed Case*, slip op. at 71. Independent Counsel can be expected to listen attentively to the representations of other officials concerning the effect of his intended actions upon other governmental concerns. Negotiation will nearly always resolve any differences. Should negotiation fail, the Independent Counsel has no coercive power of his own. The very most he can do is to invoke the coercive power of a court. The views of other government officials will be heard and weighed in the ensuing proceeding. The Ethics Act gives the Attorney General a right to appear as *amicus curiae*. 28 U.S.C. § 597(b). The process would provide no little assurance that excessively single-minded pursuit of prosecutorial concerns will not damage relations with another country or other national interests. As for the rest, Congress could properly decide that the damage likely to be done by independent prosecution was less than the damage done to the public interest by leaving the prosecution of cases in which the President and Attorney General have an actual or apparent conflict of interest nonetheless subject to their control.

There is nothing contrary to the teachings of history in the opinions quoted by the court below, slip op. at 26-51, to the effect that the "power to decide whether to investigate, and when to prosecute, lies at the core of the Executive's duties to see to the faithful execution of

the laws." Those opinions, with one exception, were describing not an arrangement ordained by the Constitution but the authority of the Executive Branch under the then existing statutes and practices.[24] The single exception, Justice White's opinion in *Buckley v. Valeo*, 424 U.S. 1, 285 (1976), speaks only of a congressional effort to usurp the functions of law enforcement, and obviously has no bearing upon giving independence to a prosecutor who may well be described as belonging to the Executive Branch.

On the other hand, *United States v. Nixon*, 418 U.S. 683 (1974), confirms the teachings of history, State practice, and professional discipline. The regulation of the Department of Justice giving the Watergate Special Prosecutor "plenary authority to control the course of investigation and litigation related to" the Watergate matter would not have been law binding on the Court if it had given away an authority that Article II requires to be vested in the President. And if the power to make independent prosecutorial judgments can be vested in a special prosecutor by departmental regulation approved by the President, surely the same authority can be vested in such an officer by a law enacted by Congress and approved by the President.

Nor can *Nixon* be distinguished upon the ground that there the President retained legal power to rescind the regulation. President Nixon had given the most solemn public assurances that he would not revoke the regulation. It passes the limits of imagination to suppose that the Framers would have believed that the legal power of a President to revoke a regulation in violation of a solemn public promise is so important that they would be willing to allow the President to delegate independent

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[24] *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 935 (1965). *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). *See also Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).

prosecutorial responsibility to another officer based on such a solemn commitment, but would nevertheless be unwilling to allow such independent responsibility to be so vested by a law made by the President and Congress, or enacted over the President's veto by a two-thirds majority in each House. In reality, though, the power to dismiss an Independent Counsel for "good cause" gives a President greater control under the Ethics Act than President Nixon retained in the Watergate affair.

2. *Article II Does Not Bar Legislation Vesting In An Inferior Officer Independent Responsibility for Functions Not Required to Be Performed by the President.*

Once it is recognized that control over specific criminal prosecutions is not quintessentially a Presidential function, the Article II attacks on the Ethics Act quickly dissipate. The court of appeals assumes that because the Constitution establishes three branches of government—characterized as legislative, executive, and judicial—the Constitution requires this Court by the definitions it gives to those terms to draw sharp lines assigning each and every governmental activity exclusively to one or another branch. This proposition has repeatedly been rejected by this Court.[25] To turn the separation of powers among the three branches into a rule requiring Presidential control over every decision that may be denominated "executive" stands upon its head a principle adopted to ensure the diffusion of power.

The principle that Congress and the President may by law vest in a designated officer the responsibility for performing specific executive functions, and also make that officer's decision final and binding upon others, was established in the early days of the Republic. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Court issued a writ of mandamus to require

[25] *See Nixon v. Administrator of General Services*, 433 U.S. 425, 441-446 (1977), and authorities there cited; *c.f. The Federalist* No. 47 at 325-26 (J. Madison) (J. Cooke ed. 1961).

the Postmaster to comply with a law directing him how to settle a disputed account, typically an executive function. To arguments drawn from Article II and the separation of powers the Court replied:

> The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.
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> *Id.* at 610.

The Court continued:

> The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. *But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President.*
>
> *Id.* (Emphasis added.)

The Court next recognized that there are many "political duties" imposed on officers in the Executive Branch that are normally discharged under direction of the President, and then went on to rule:

> But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.
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> *Id.*[26]

[26] This sentence follows immediately after the truncated and therefore misleading excerpt quoted in note 21 to the majority opinion in the court of appeals. Slip op. at 26.

Since 1887 the increase in social and economic legislation has multiplied exponentially the number of instances in which the laws vest in designated officers the power of final decision without interference by the Chief Executive on a matter that might have been left to his discretion. The constitutionality of such legislation is beyond question. *See e.g., Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The President's duty to "take Care that the Laws be faithfully executed" is performed by taking care that the officer faithfully performs the statutory duty. *See* 1 Op. Att'y Gen. 624, 626 (1823), 11 Op. Att'y Gen. 14, 16 (1864). The Ethics Act does not interfere with the President's performance of this constitutional duty because Section 596(a)(1) gives the Attorney General power to remove an Independent Counsel "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

3. *The Statutory Limitation Upon The President's Power of Removal Without Good Cause Does Not Infringe Upon An Exclusive Presidential Prerogative.*

Just as the century-old practice of establishing independent agencies to perform functions that might be delegated to the President illustrates that the Constitution does not require Presidential control of every non-legislative and non-judicial function, so too the decisions of this Court show that the power of the President to remove an officer at his pleasure may constitutionally be limited by law in a situation like that here, where Congress has constitutionally created an office whose duties are to be performed independent of Presidential control. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *See also Weiner v. United States*, 357 U.S. 349 (1958).[27]

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[27] To distinguish *Humphrey's Executor*, as the court below does, upon the ground that the Court spoke of the functions of independent agencies as "quasi-legislative" and "quasi-judicial" is to attribute a magical power to those words. In reality, responsibilities performed by the Interstate Commerce Commission, for example, in fixing railroad rates, are not significantly different from the functions performed by, for example, the Secretary of Agriculture in fixing milk prices, *see, e.g., United States v. Rock Royal Cooperative*, 307 U.S. 533 (1938), or the Secretary of Labor in fixing wages under the Walsh-Healy, 41 U.S.C. §§ 35-45, and Davis-Bacon Acts, 40 U.S.C. § 276a *et seq.*

II. INVESTING INDEPENDENT POWER TO PROSECUTE SPECIFIC CRIMINAL CHARGES AGAINST HIGH GOVERNMENT OFFICIALS IN AN INFERIOR OFFICER DOES NOT VIOLATE THE SEPARATION OF POWERS.

The constitutional purpose of the separation of powers is to prevent "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Bowsher v. Synar*, 106 S.Ct. 3181, 3189 (1986). Unlike the legislation held unconstitutional in those cases and in *Myers v. United States*, 272 U.S. 52 (1926), the Ethics Act transfers no power whatever from the Executive Branch to Congress, to any branch of Congress, or to any officer subject to any form of congressional control. Congress is given no voice in the appointment or removal of an Independent Counsel and no control over a Counsel's performance of the duties of the office.

In order to find an aggrandizement of congressional power, the court below was driven to engage in fanciful speculation, such as that the ability of members of the House and Senate Judiciary Committees to request the Attorney General to appoint an Independent Counsel "may, like a flicking left jab, confound the Executive Branch in dealing with Congress." Slip op. at 67.[28] The observation is as irrelevant as it is speculative. There is no enlargement of the power of Congress or of the members of any committee. Specific and credible information

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[28] Section 595(c) provides for such requests and requires the Attorney General, if he does not request the appointment, to explain his reason for failing to do so within thirty days.

suggesting criminal activities of high Presidential aides might equally affect the relative political influence of the President and Congress even in the absence of the Ethics Act. As for the political effect of the Independent Counsel mechanism—even if that were relevant—the availability of machinery for resolving charges free from suspicion of personally or politically motivated Presidential interference will typically strengthen a President's political position, unless he has political need to hide what has occurred.

Nor does the Ethics Act unconstitutionally aggrandize the Judicial Branch at the expense of the Executive. Article II, Section 2 specifically authorizes the courts of law to appoint inferior officers pursuant to Acts of Congress. An Independent Counsel is such an officer. *See* Point IIIA, *infra*. Defining the subject matter jurisdiction of each Independent Counsel in terms of the concrete charges or cases assigned is a necessary incident of an appointment *ad hoc*. The power that Section 596(b)(2) confers upon the court to terminate an office of Independent Counsel obviously contemplates none of the day-to-day judicial supervision of the conduct of an investigation conjured up by the court below. Slip op. at 82-83.[29] Similarly, Section 596(a)(3), which provides for judicial review of any removal of an Independent Counsel, has none of the implications supposed by the majority below. Whatever room there may have been for misunderstanding earlier versions of the Ethics Act, the recent amendments to the Act make plain that the scope of review here is to be no greater than the wholly familiar judicial review of discharges of other employees and officials for "good cause." H. Conf. Rep. No. 452, 100th Cong., 1st Sess. 14, 37 (1987).

[29] The court's power should be read as a largely formal mechanism for tidying up two situations: (a) cases in which there is no controversy over whether an Independent Counsel has completed the assignment, but Counsel has failed to file a report; and (b) cases in which an Independent Counsel has ceased to pursue the investigation.

There is no greater force in the suggestion that even though the Act does not enlarge congressional power, it diminishes the power of the President to such a degree as to offend the basic constitutional purpose of preserving a balance among the three Branches. *See Commodities Futures Trading Comm. v. Schor*, 106 S.Ct. 3245, 3260-61 (1986). As Justice O'Connor made plain there, the question in such cases is one of degree. As we have already shown, in appropriate cases Congress may by law charge inferior officers with independent responsibility for performing specified functions that may be described as executive, and may also protect that independence by limiting the President's discretionary power of removal. And as we have also shown, control over the conduct of the very narrow range of criminal investigations and prosecutions covered by the Ethics Act is not a core executive function.

Viewed in the total context of executive powers and duties, therefore, cases under the Ethics Act are trifling in number, involve no core Presidential responsibilities, and require no resolution of large questions of policy. Because high officials and public confidence in the integrity of government are involved, the cases have great dramatic interest and grave national importance. But the interest and national importance arise out of the very circumstances that require the mechanism provided by the Ethics Act. The officials covered by the Act are close to the President, so close that he is likely to be personally affected by the outcome, so close that there is an actual or apparent conflict of interest raising public suspicion of selfish personal or political interference by the President or Attorney General. The Independent Counsel mechanism takes no important power from a President short of the ability to abuse power, and, in the long run, the mechanism is the best—if not the only—way to preserve the public confidence in the integrity of a President upon which his proper power and the power of his successors depends.

III. INDEPENDENT COUNSEL ARE "INFERIOR OFFICERS" WHOSE APPOINTMENT ARTICLE II AUTHORIZES CONGRESS "BY LAW" TO VEST IN A COURT OF LAW.

Article II, Section 2, clause 2 of the Constitution provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The court below held that Congress lacked power by law to vest the appointment of Independent Counsel in a court, first, because Independent Counsel cannot be "inferior officers," and second, because in any event the Constitution bars the appointment by a court. We submit that both rulings are wrong.

A. Independent Counsel Are "Inferior Officers."

The present case requires no decision of the much-debated question whether the power to vest the appointment of "inferior Officers" in the President alone, in the Courts of Law, or in the Heads of Departments extends to all offices other than those particularly named in the Constitution. Even if "inferior Officers" is interpreted more narrowly, the Appointments Clause permits the President and Congress, or Congress alone upon overriding a veto, to provide "by law" for the appointment of officers with the narrow jurisdiction, relatively brief tenure, and important but limited independence of an Independent Counsel.

In the 18th century, as today, the adjective "inferior" was commonly used to mean "low or lower in station, rank, degree, or grade" and "of little or less importance, value, or excellence," without the slightest implication of being subjected to some other specific person's commands.[30]

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[30] *E.g.*, Thomas Sheridan, *A General Dictionary of the English Language, Vol. I* (1780); *Johnson's and Walker's English Dictionaries Combined* (1823); Noah Webster, *An American Dictionary of the English Language* (1830).

A dictionary published in Philadelphia in 1785 defines "inferior" as "lower in place; lower in station or rank of life; lower in value or excellence," and only last as "subordinate."[31] We commonly apply the adjective in this sense to kinds of work, positions, and even people, as well as products and ideas. Whether an office is "inferior" accordingly depends upon its relative rank or importance among all offices of the United States, including the scope of its duties, its duration, the degree of policymaking, and the relative amounts of independent discretion and supervisory control.

Judged by these criteria the Independent Counsel are plainly "inferior Officers." In rank and general importance they fall well below the officers named in the Constitution and a wealth of sub-Cabinet and independent agency positions. The jurisdiction of each Independent Counsel is limited to the investigation and, if appropriate, prosecution of the alleged criminal conduct of a single person, or growing out of a single set of related activities. The complete picture is of an officer whose role is limited to sharply defined bounds set by others, whose tenure is temporary, who is subject to the web of restraints imposed on prosecutors by both the Justice Department and the court, and who may be removed from office for violation of the Department's policies or other malfeasance or misconduct. Nothing in the words of the Constitution, the records of the Philadelphia Convention or the subsequent interpretation requires the conclusion that the appointment of such an officer must, despite legislation to the contrary, be made upon the advice and consent of the Senate.[32]

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[31] S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced From Their Originals* (1785).

[32] In limiting the words "inferior Officers" to those officials who are always subject in all important respects to some superior's direction and control, the court below was greatly influenced by imaginary examples of abusive legislation, enacted by two-thirds majorities over the President's veto, stripping the President of all normal executive functions. Slip op. at 39-41. Since *Gibbons v.*

The scant evidence of contemporary understanding confirms our interpretation. Discussion at the Constitutional Convention focused on the question whether the Executive, the Legislature or the courts should make appointments. The only relevant colloquy shows that the exact wording of the second part of the Appointments Clause was considered a matter of slight importance.[33] The most plausible explanation is that the delegates were willing to allow Congress and the President, or Congress by two-thirds majorities, the wide power to decide by law which offices created by law might appropriately be filled by appointments made without the advice and consent of the Senate.[34]

Ogden, 22 U.S. (9 Wheat) 1, 187-89 (1824), the Court has repeatedly ruled that the ability to hypothesize abuses of a power delegated to Congress is not sufficient reason for a narrow interpretation. In this instance there are also constitutional checks. Legislation of the extreme character imagined by the majority below would be subject to constitutional attack under other sections of Article II in accordance with the suggestion in *Commodity Futures Trading Comm. v. Schor*, 106 S.Ct. 3245, 3252 (1986). No such problem is presented by the Ethics Act.

[33] 2 *The Records of the Federal Convention of 1787* 627 (M. Farrand ed. 1966).

[34] This was the conclusion reached by Justice Story, who lived at a time much closer to the Framers than today:

> The propriety of this discretionary power in congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience.
>
> 3 Story, *Commentaries on the Constitution of the United States*, §§ 1529, 1530 *reprinted in* 4 *The Founders' Constitution* 117, 119 (P. Kurland and R. Lerner, eds. 1987).

As noted above, the original draft of the Judiciary Act of 1789 also supports this understanding, in that it is evidence a number of the Framers believed that the Appointments Clause gives Congress and the President discretion to vest "by law" the appointment of both the Attorney General and United States Attorneys in the courts.

In enacting and reenacting the Ethics Act, three Congresses and two Presidents have concluded that an Independent Counsel is an Inferior Officer for whose appointment the advice and consent of the Senate is constitutionally required. This Court, in accordance with settled rules of constitutional interpretation, should give great weight to those judgments by the other two branches in exercising the power delegated to them by the Appointments Clause. That the Court has the final responsibility for interpreting the Constitution is beyond dispute. When the question turns solely upon the text, there may be scant room for deference beyond weighing with respect the opinion of others. But the settled rule is opposite, when as here, the case is within the outer textual limits of the delegation of legislative power to Congress, and the final judgment must turn upon finding and appraising the significance of facts, upon the balancing of several factors, and upon like questions of value and degree. In the latter cases, the rule since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) has been that the Court will not upset a rational congressional judgment. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); L. Tribe, *American Constitutional Law* 303 (2d ed. 1987).

The present case falls in the latter class. In deciding whether an Independent Counsel is an inferior officer, it was for Congress to appraise the amount and overall significance of the independence it conferred in the context of such limiting factors as the specificity of the assignment, the brevity of each appointment, the absence of policy-making power, the obligation to conform to established policies of the Department of Justice, and the relative place of the office in the over-all plan of government. This Court could properly overturn the considered legislative judgment only if the constitutional text contained an absolute mandate requiring any officer in whom any significant degree of independence is vested to be appointed by the President with the advice and consent of the Senate regardless of any other circumstance. So rigid a rule would unduly constrict the organization of execu-

tive and administrative functions. It might well overburden the Senate. And, as applied to the narrow but important problem addressed in the Ethics Act, it would erode confidence in the rule of law by making it constitutionally impossible to provide assurance that the investigation and prosecution of crimes by high officials were conducted, as in the case of other citizens, by prosecutors serving only the ideal of impartial justice free from the dictates or pressures of political or personal self-interest.[35]

B. Appointment of Independent Counsel by a Court of Law is Authorized by Article II and Congruent with the Judicial Function under Article III.

The words of the Appointments Clause, given their plain meaning, expressly authorize Congress to vest the appointment of any inferior officer in the President alone, in the courts of law, or in the heads of departments, "as they think proper." There is no express limitation. *Ex-Parte Siebold* squarely upholds the constitutionality of legislation vesting in the circuit courts the duty of appointing supervisors of election whose duties were alleged to be "entirely executive in character" and "not connected with the judicial department." 100 U.S. at 397-99. The Court did not question this description. The decision plainly holds that unless barred by some other constitutional provision, Congress has discretion under the Appointments Clause to choose to vest the appointment of an inferior officer in a court of law regardless of whether the duties of the office might be characterized as executive, or judicial, or connected to the legislative branch.

[35] Under the narrow construction of "inferior Officers" adopted by the court below, the appointments of Special Watergate Prosecutors were unconstitutional because made without the advice and consent of the Senate. *United States v. Nixon*, 419 U.S. 683 (1974) implicitly upholds the constitutionality of those appointments. The distinction offered in the majority opinion below, slip op. at 18 n.17, has the absurd consequence of attributing constitutional significance to a President's retention of technical legal power to revoke a departmental regulation in violation of his explicit promises not only to the person appointed, but to the American people.

In support of his novel ruling that the Appointments Clause bars legislation vesting in one branch the power to appoint an individual to a position belonging to another branch, Judge Silberman quoted only the following sentence:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties appertain.
>
> *Id.* at 397.

Judge Silberman omitted the next sentence and the remainder of the key passage from the *Siebold* opinion:

> But there is no absolute requirement to this effect in the Constitution. . . . [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. . . . [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it.
>
> *Id.* at 397-98.

In speaking of "incongruity" the Court evidently referred to its earlier decisions holding that Congress may not call upon Article III courts to perform duties outside their constitutional functions. The Court then held that there was no such incongruity in the case before it because the duty to appoint inferior officers when directed by law is imposed by the Constitution. The present case is even clearer because appointing prosecutors has long been a familiar judicial function. *See* p. 14, *supra*.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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